Supreme Court of the United States

October Term, 1964.

No. 240

Local Unions Nos. 189, 262, 320, 546, 547, 571 and 636 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al.,

Petitioners,

vs.

Jewel Tea Company, Inc.,

Respondent.

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et. al.,

Petitioners,

VS.

Jewel Tea Company, Inc.,

Respondent.

MOTION BY AMERICAN FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The American Farm Bureau Federation hereby respectfully moves for leave to file a brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorneys for the petitioners was requested but refused.

The American Farm Bureau Federation, 1000 Merchandise Mart, Chicago, Illinois 60654, is a general farm organization incorporated under the "General Not For Profit

Corporation Act" of the State of Illinois. Farm Bureau was organized in 1919 for the purpose of promoting, protecting and representing the business, economic, social and educational interests of farmers and ranchers of the United States. It has member State Farm Bureaus in all of the states of the United States (except Alaska) and in Puerto Rico, representing more than 1,600,000 Farm Bureau member families. The largest percentage of the Farm Bureau membership is comprised of livestock producers and feeders.

The interest of the American Farm Bureau Federation in this case arises from the fact that a substantial portion of the livestock producers' market for fresh meat is lost due to marketing limitations imposed by labor unions and acquiesced in by food stores in the Chicago area. Under the limitations in question relative to the sale of fresh meat "no customer shall be served who comes into the market before or after the hours" of 9:00 a.m. to 6:00 p.m. A customer entering the store after 6:00 p.m., or before 9:00 a.m., will find all kinds of red meat available for selection and purchase from self-service counters. This meat was prepared and packaged by union members during regular working hours. However, the consumer is restrained from buying and the food store is prohibited from selling fresh meat. Thus, livestock producers are foreclosed from their ultimate market as the result of agreements and contracts between the petitioner unions and others.

The American Farm Bureau Federation has filed relatively few *amicus curiae* briefs with this Court, recognizing that such briefs should be held to a minimum. This organization did not plan to file a brief in this case until

recently. The decision of the Court of Appeals seemed so clear and reasonable that it appeared obvious that the parties to this case could adequately present the issues and arguments to this Court in such a manner that it would not be necessary for non-litigants to become involved and thereby take additional time of this Court in considering this case. However, the recent intervention by the Solicitor General in support of the unions' position necessitated an expression by this organization on behalf of its membership. We regret that the Federal government has not taken a position favoring the removal of such unreasonable restraints on the sale of fresh meat. It is our firm belief that the activities of the defendants in this case are contrary to the best interests of all Americans, including farmers and ranchers, and are a violation of the antitrust laws.

The above entitled cause not only poses the question whether the limitation upon market operating hours and the controversy concerning it are within the labor exemption of the Sherman Antitrust Act, but also the question whether producers of fresh meat will be foreclosed of their market while their direct competitors, their foreign counterparts, and their indirect competitors, producers of substitute products, have access to consumers.

Petitioners herein have jurisdiction over not only fresh red meat but fresh poultry, packaged and canned meats, and frozen meat, poultry, fish and seafood. All of these items are displayed in cases, and the displays are stocked, arranged and rearranged by butchers. The question thus presented is whether the unions, by collective bargaining agreements, can restrain trade in certain of the products of America's farmers by limiting the hours during which

such products may be sold, while at the same time allowing sale of others.

Since the issues and ramifications in this case are much broader in scope than the briefs of the parties hereto would indicate, the American Farm Bureau Federation respectfully requests that it be permitted to file an *amicus curiae* brief in this case so that the views of the farmers and ranchers of the United States in this controversy may be more adequately presented.

Respectfully submitted,

/s/ Allen A. Lauterbach,
General Counsel,
American Farm Bureau Federation,
1000 Merchandise Mart,
Chicago, Illinois 60654.

NOTICE OF MOTION.

To: Lester Asher
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Please take notice that on the *Eighth* day of *January*, 1965, the undersigned will file the above motion and accompanying Brief in the office of the Clerk of the Supreme Court of the United States, said motion to be considered at the convenience of the Court.

/s/ Allen A. Lauterbach,
Attorney for
American Farm Bureau Federation,
1000 Merchandise Mart,
Chicago, Illinois 60654.

AFFIDAVIT OF SERVICE.

L. Gene Lemon, being duly sworn, deposes and says that in compliance with paragraph 33 (1) of this Court's Rules, he deposited a copy of the above Motion and Notice of Motion in the United States Post Office in the City of Chicago, properly addressed to the attorneys for the parties, with firstclass postage fully prepaid on the *Eighth* day of *January*, 1965.

/s/ L. Gene Lemon,
Of Counsel.

Subscribed and sworn to before me this *Eighth* day of *January*, 1965.

/s/ Myrtle Robinson,
Notary Public. (Seal)

My commission expires on
October 5, 1966.

INDEX TO BRIEF.

CITATIONS.

Cases:

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OCTOBER TERM, 1964

No. 240

Local Unions Nos. 189, 262, 320, 546, 547, 571 and 638 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et. al.,

Petitioners,

VS.

Jewel Tea Company, Inc.,

Respondent.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

STATEMENT OF FACTS AND INTEREST

The American Farm Bureau Federation (hereinafter called "Farm Bureau"), 1000 Merchandise Mart, Chicago, Illinois 60654, is a general farm organization, incorporated under the "General Not For Profit Corporation Act" of the State of Illinois. Farm Bureau was organized in 1919 for the purpose of promoting, protecting and representing the business, economic, social and educational interests of farmers and ranchers of the United States. It has member State Farm Bureaus in all of the states of the

United States (except Alaska) and in Puerto Rico, representing more than 1,600,000 Farm Bureau member families.

The interest of Farm Bureau members in this case derives from the fact that livestock production is by far the most important source of agricultural income in the United States, and more than one million Farm Bureau member families are engaged in livestock production. Generally, farmers do not meet or deal with those for whom they produce but rather depend upon retailers, butchers and others to represent their products favorably to consumers.

Farm Bureau members are concerned about the loss of a substantial portion of the livestock producers' market for fresh meat due to marketing limitations imposed by labor unions and acquiesced in by food stores in the Chicago area. Historically and presently, the Chicago live and dressed meat market has been the one to which everyone concerned with the movement of such products looks for market facts. Not only is it a vast interstate market in its own right, it is a key influence on the other markets of the nation.

Under the limitation in question relative to the sale of fresh meat "no customer shall be served who comes into the market before or after the hours" of 9:00 a.m. to 6:00 p.m. A customer entering the store after 6:00 p.m. or before 9:00 a.m. will find all kinds of red meat available for selection and purchase from self-service counters. This meat was prepared and packaged by union members during regular working hours. However, the consumer is restrained from buying and the food store is prohibited from selling fresh meat during these restricted hours. Thus, livestock producers are foreclosed from their ulti-

mate market as the result of agreements and contracts between the petitioner unions and others.

The food industry is a highly competitive one in which many products vie for consumer preference. Fresh beef, pork, lamb and veal compete for a place on the dinner table with poultry and ham, with processed and frozen meats of endless variety, with frozen fish and seafood, with meat substitutes such as beans, rice and the noodle family of food. Some of the competitive products are imported canned and frozen meats; others include imported raw materials for use in sausage, weiners, cold cuts, etc. (*Foreign Agriculture Circular*, U.S.D.A., October, 1964, Table 2.)

The activities of the petitioner unions have resulted in an unreasonable burden of the free and uninterrupted flow of fresh meat products to the consumer. The meat has been prepared, packaged and placed in refrigerator counters, during regular working hours, by members of the butchers' unions. No further labor, union or otherwise, is necessary to complete the marketing cycle from farmer to consumer. However, there is an obstacle that has been placed between the meat counter and the consumer—a restraint that says, "Do Not Touch This Meat." Yet, those responsible for this limitation do not place similar restraints on frozen beef from Argentina or canned ham from Poland.

By the terms of the collective bargaining agreement, here in controversy, negotiated between butchers' unions and food stores in Chicago, fresh beef, pork, lamb and veal are removed from the above competition 25 percent of the time during which customers shop. Not only is the consuming public inconvenienced by the restriction; farmers and ranchers also feel the impact.

ARGUMENT.

I.

THE LIMITATION UPON MARKET OPERATING HOURS AND THE CONTROVERSY CONCERNING IT ARE NOT WITHIN THE LABOR EXEMPTION OF THE SHERMAN ANTITRUST ACT.

(a) Labor unions are exempt from the reach of the Antitrust Laws only when they are lawfully carrying out their legitimate objects or when they are lawfully involved in a dispute concerning terms or conditions of employment.

The history of antitrust laws in the United States is so well known that it need not here be repeated, except to overcome conceptual problems. Suffice it to say, laborers and farmers alike feared that the Sherman Act would not only destroy the great business trusts which they opposed, but also it would destroy the right to organize unions and cooperatives. The Clayton Act was passed in 1914, somewhat allaying these fears.

Subsequently, the Capper-Volstead Act was passed to further protect cooperatives, and the Norris-LaGuardia Act was passed to further protect labor organizations.

For purposes of this case, the language of the Clayton Act, read in the light of the Norris-LaGuardia Act, is controlling. The Norris-LaGuardia Act was passed to further restrict the use of injunctions, to legalize the secondary boycott, and to broaden the definition of a labor dispute. Section 6 of the Clayton Act provides that the antitrust laws do not forbid labor organizations or indi-

vidual members "from lawfully carrying out the legitimate objects thereof." Section 20 of the same act provides that an injunction should not issue in "a dispute concerning terms and conditions of employment."

The meaning of "legitimate objects" and of "labor dispute". Congress left to the courts to interpret. Consequently, the scope of the labor exemption will be determined on a case by case basis. The Court has consistently refrained from interpreting the antitrust acts as wholly exempting labor unions from the Sherman Act. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 448; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797. Among those cases, Congress had and took the opportunity to express itself. When the decisions did not grant labor organizations a sufficiently broad exemption, further legislation was passed. Since the last decision above was rendered, however, Congress has not broadened the exemption. Indeed, proposals have been of the order to make abundantly clear that the exemption is not to be construed as complete. See Cox, Labor and Anti-Trust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955).

Recent expressions of this Court continue to reaffirm the supremacy of those laws which foster competition. In *United States* v. *Maryland & Virginia Milk Producers Association, Inc.*, 362 U.S. 458, the Court stated that the provisions of Section 6 of the Clayton Act "relating to labor unions do not manifest 'a congressional purpose wholly to exempt' them from the antitrust laws, and neither the language nor the legislative history of the section indicates a congressional purpose to grant any broader immunity to agricultural cooperatives." At 464-65.

(b) The marketing hours restriction controversy is not a legitimate object of labor or a dispute concerning wages, hours or other terms and conditions of employment.

While the legitimate objects of a labor union are many and varied, the contract clause in controversy does not relate to any proper objective of organized labor. It does not relate to working hours, rates of pay, job protection or other conditions of employment. Put simply, it restrains trade and inconveniences the public, the District Court found. Labor on the products has ceased. Union members have prepared the fresh meat, packaged it, placed it in display cases and arranged it for consumer selection. Whatever happens thereafter is beyond the objects and purposes of organized labor. Consequently, the restriction in question is outside of the area of union concern.

The purpose of the unions in fixing the meat counter closing time at 6:00 o'clock p.m. is said to be to insure butchers that they may perhaps one day open their own shops without having to work exceedingly long hours as private entrepreneurs. (App. 95-96.) The objective, therefore, is not for the benefit of union members but for the benefit of private meat market owners. It does not now and never will protect the health of a union member. Viewed in this light, the restriction appears as what it is—a bald regulation of business competition serving no legitimate purpose.

The fact that trade after 6 o'clock p.m. is considered by the unions to be undesirable is not a good reason for allowing it to be destroyed. All labor conduct in restraint of trade is not to be exalted. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. We respectfully suggest that sincere advocates of the rights of labor unions must not

yield to the social arguments of extremists in the labor movement who contend that we must continue to "progress" toward the acceptance of the doctrine that what is good for the labor union must be good for all society, and that all laws must be so interpreted and enforced.

Since the *Allen Bradley Case,* many lower courts have had occasion to apply its doctrine, rejecting the unions' claim that whenever their efforts are calculated to advance the interests of their members the effect upon others is not to be considered. *United States* v. *Milk Drivers and Dairy Employees Union,* 153 F. Supp. 803 (D. Minn. 1957); *I.P.C. Distributors* v. *Chicago Moving Picture Machine Operators Union,* 132 F. Supp. 294 (N.D. Ill. 1955); *Rogers* v. *Poteet,* 355 Mo. 986, 199 S.W. 2d 378 (1947); *Kold Kist* v. *Amalgamated Meat Cutters and Butchers,* 99 Cal. App. 2d 191, 221 P. 2d 724 (1950). The last case is very similar to the one at bar, involving, as it did, a marketing hours restriction on the sale of frozen meats, poultry and fish.

(c) General principles of statutory construction dictate that the Antitrust Acts be given effect in the marketing hours controversy.

(1) Harmonization of the Antitrust Laws and Labor Laws requires the declaration that the marketing hours restriction is illegal.

"Whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *United States* v. *Hutcheson,* 312 U.S. 219, at 231.

"The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." *Allen Bradley Co.* v. *Local No. 3,* 325 U.S. 797, at 806.

The policies of these statutes should be compared with the objectives of the parties. It actually is the latter which must be examined to determine which of the two statutory policies should be here given effect, all the while minimizing the discouragement which is consequently wrought upon the opposing Congressional policy. Both policies can be given effect at the same time by preferring the one which does least damage to the other.

Jewel's purpose here is to serve consumer demands. By doing so, it creates greater volume and profit for itself, more jobs for butchers and a wider market for farmers.

Americans are a busy people, often in a hurry. They shop when it is convenient for them to do so, and they have money to buy those items which they prefer. Fresh meat is preferred by consumers, as are other fresh foods. Yet in their haste, Americans do not wait until they can purchase the preferred item; they purchase a substitute instead when their preference is unavailable.

Jewel as an expert retailer of fresh meat has to offer its products for sale when the consumers are buying or Jewel will not sell them at all. These reasons motivate

Jewel to contest the marketing hours restriction contained in its collective bargaining contract, and these are the desires which the Antitrust Laws seek to promote.

The unions, on the other hand, have as their purpose and objective the strengthening of collective bargaining through the organization of labor so as to improve terms and conditions of employment. Such purpose is the policy of the United States to promote, that laborers will not be exploited and that this vast segment of American society will share the abundance and wealth which the nation enjoys.

The services of butchers are irrevocably tied to the products they prepare. Union members undoubtedly believe that the tighter their collective control of the product, the stronger their hold is on their jobs, on their security and on their welfare. Consequently, the objective of the unions in this controversy is not purely arbitrary.

Construing both policies expressed in the statutes liberally, attempting to encourage both, less harm is done by allowing the policy favoring competition to prevail.

The serious inconvenience to consumers, the detrimental effect on American agriculture and the restriction on grocery retailer competition are the losses caused if the labor law is to govern here. The losses, if any, wrought by favoring competition and the antitrust laws which implement it, surely cannot be as great. This is the balancing, the harmonizing, which must be done.

(2) Consideration of other expressions of policy by Congress requires that the marketing hours restriction be declared illegal in this controversy.

Farmers' costs of production have been steadily increasing while prices received for farm products have been decreasing. In other words, the farmer has been caught in a cost-price squeeze. The Federal government has been spending billions of dollars annually to help alleviate the agricultural situation.

Increased costs of doing business, of which direct and indirect labor costs are important, have been responsible to a large degree for the present cost-price squeeze facing agriculture. To lessen the financial burden of the Federal government and to strengthen the economy of this segment of our society, it is necessary that every effort be made to avoid further restraints on the normal movement of food products from the farm to the consumer. The elimination of such restraints is not only in the interests of all farmers and ranchers, it is also in the best interest of the consumer. In other words, it is in the public interest to avoid impairments of competition, whether committed by industry, labor or agriculture.

Such restraints on the free flow of commerce burden commerce by increasing the cost of fresh meat products to the consumer and also by placing fresh meat at an unfair disadvantage in competition with canned and frozen meat products, some of which have been produced in foreign countries where production and processing costs are not as high. The lower the price consumers pay for fresh meat, the more they will consume. But the farmer's cost of production is only one item of the total cost which the purchaser of a package of fresh meat must pay. An-

other item is the cost of refrigerator display cases. That cost is the same whether the case is used one hour, nine hours or twelve hours a day. The more fresh meat that is sold from the case, the more the cost is spread, lowering the cost borne by each package. The resulting increased consumption of fresh meat benefits the health and the purse of the public, in addition to increasing market opportunities for farmers in the sale of fresh meat.

It is generally recognized that farmers benefit much more when farm products are marketed as fresh produce. Consumers generally prefer fresh farm products rather than a processed commodity. This is evidenced by the fact that consumers prefer to purchase fresh meat if it is available at reasonable prices. Farmers derive a larger portion of the consumers' dollar when their livestock is sold as fresh meat rather than if sold as processed meat or as other materials added to processed foods. However, if artificial barriers and restraints of trade are permitted to exist, both the consumer and the farmer suffer. Unfair marketing practices cause the price to the consumer to be higher than justified, thereby resulting in a smaller demand for fresh meat. This naturally results in restricted markets for agriculture's major industry.

These practices stimulate sales of foreign canned and frozen meat as foreigners can produce and process livestock at lower labor and other production costs. This results in a hinderance to the domestic agriculture situation and to the American economy in general and, consequently, is contrary to the public interest.

The activities of the butchers' unions are also directly responsible for transferring job opportunities to foreign

workers, at the expense of American workers. For every pound of foreign meat or meat substitutes that is sold during the restricted hours a comparable amount of wages for an American employee is lost. American dollars, along with job opportunities, are being exported when it is in the public interest to improve our balance of payments as well as to create more employment opportunities in the United States.

Consumers have been the recipients of technical improvements in food production and distribution. Competition has been shortening the marketing bridge from farmer to consumer. Any unreasonable interference with the flow of food products through this "marketing bridge" is contrary to the public interest and is illegal.

No one should forget that members of unions are also consumers and that, as such, all union members stand to lose by unreasonable marketing practices which add to the cost of food.

Farm Bureau shares the concern expressed by the Seventh Circuit Court of Appeals, *Jewel Tea Company, Inc.* v. *Amalgamated Meat Cutters*, 331 F. 2d 547 at 551, quoting from its earlier opinion, 274 F. 2d at 221, that if an employer can not make management decisions regarding the hours that he may keep certain departments of his store in operation, he may be forced by union activity to forego more and more management decisions even though they are not related to conditions of employment. If the unions' position in this case is sustained by this Court, it is conceivable that unions can bargain on such other decisions as where a food store may be located, what products may be sold at the store, who may supply the products for the store, and what prices (mini-

mum and maximum) may be charged. There is no limit to which labor unions could go in closing down, or regulating, other types of business activity, such as elevators, printing presses, airlines or railroads.

II.

THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE EXCLUSIVE JURISDICTION OF ANTITRUST CONTROVERSIES WHICH INVOLVE LABOR UNIONS.

None of the antitrust laws depend upon a specialized agency for their administration. Federal courts historically have and now do administer this body of law. We do not agree with the unions' position that this controversy is within the exclusive primary jurisdiction of the National Labor Relations Board.

The unions' position is somewhat similar to the position taken by the cooperative in the case of *United States* v. *Maryland & Virginia Milk Producers Association, Inc.*, 362 U.S. 458. The chief defense of the association in that case was that "because of its being a cooperative composed exclusively of dairy farmers, Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act completely exempted and immunized it from the antitrust laws with respect to the charges made in the government's complaint." Section 2 of the Capper-Volstead Act authorizes the Secretary of Agriculture to issue a cease-and-desist order upon a finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced".

This Court, in considering the arguments of the association, concluded:

> The contention is that this provision was intended to give the Secretary of Agriculture primary jurisdiction, and thereby exclude any prosecutions at all under the Sherman Act. This Court unequivocally rejected the same contention in *United States* v. *Borden*, 308 U.S. 188, 206, after full consideration of the same legislative history that we are now asked to review again. We adhere to the reasoning and holding of the Borden opinion on this point. 362 U.S. at 462-63.

In the *Borden* case the Court stated that:

> We find no ground for saying that this limited procedure (Section 2 of Capper-Volstead Act) is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. 308 U.S. 188, at 206.

And, it is entirely defensible that Congress should so intend and the courts so hold. The case here before the Court is directly between a retail food chain and unions, but its decision is of great interest and will have great impact on the largest industry in the United States. This controversy and most antitrust cases are ones requiring not so much expertise in either labor or economics as they do the broad overview of public policy and objectives inherent in the courts. The duty of the N.L.R.B. is to foster collective bargaining, to encourage labor unions and to promote industrial peace. Where do farmers and the business of agriculture fit into the picture? Courts are better able to protect these minority interests which are otherwise liable to be excluded from consideration by specialized agencies looking only to the development and protection of the specific groups with which they work.

CONCLUSION.

We respectfully urge that the judgment of the Court of Appeals for the Seventh Circuit of April 27, 1964, reversing the judgment of the District Court of November 28, 1962, be affirmed and that the case be remanded to the District Court with directions to enter a declaratory judgment and an injunction against the defendants herein and to ascertain and award to plaintiff such monetary relief as may be appropriate.

Respectfully submitted,

/s/ Allen A. Lauterbach,
General Counsel,
American Farm Bureau Federation,
1000 Merchandise Mart,
Chicago, Illinois 60654.

January 8, 1965

AFFIDAVIT OF SERVICE.

L. Gene Lemon, being duly sworn, deposes and says that in compliance with paragraph 33(1) of this Court's Rules, he deposited a copy of the above Brief in the United States Post Office in the City of Chicago, properly addressed to the attorneys for the parties, with first-class postage fully prepaid on the *Eighth* day of *January*, 1965.

/s/ L. Gene Lemon
Of Counsel

Subscribed and sworn to before me this *Eighth* day of *January*, 1965.

/s/ Myrtle Robinson
Notary Public (Seal)

My commission expires on
October 5, 1966.